

MINUTES OF MEETING
MAPLE RIVER WATER RESOURCE DISTRICT
CASS COUNTY HIGHWAY DEPARTMENT
WEST FARGO, NORTH DAKOTA
AUGUST 4, 2016

The Maple River Water Resource District met on August 4, 2016, at 8:00 a.m. at the Cass County Highway Department, West Fargo, North Dakota.

Present were Rodger Olson, Chairman; Jurgen Suhr, Manager; Gerald Melvin, Manager; Carol Harbeke Lewis, Secretary-Treasurer; Kathy Grueneich, Administrative Assistant; Sean Fredricks, Attorney for the Board; Mike Opat, Engineer for the Board; and those whose names appear on the attached roster.

Minutes

It was moved by Manager Suhr, seconded by Manager Melvin and unanimously carried to approve the minutes of the July 7, 2016, meeting.

Tower Township Improvement District No. 77

There was discussion on the process for *Tower Township Improvement District No. 77*. The Cass County Flood Sales Tax Committee has approved funding \$20,000 towards the bond to pursue the project. Property owners have submitted \$24,500. The project can proceed upon receipt of a *Petition and Bond* and a total bond of \$50,000.

Upper Swan Creek Channel Improvements

Mr. Opat reported that work continues on right of way acquisition for the Upper Swan Creek Channel Improvements Project. Property owners wanted additional rip-rap, which would increase the project cost \$10,000 to \$15,000. A Resolution is being prepared regarding the bond issue needed for the project.

A motion made by Manager Suhr and seconded by Manager Melvin to approve the *Purchase Agreement* with Dallas D. Nesemeier and the *Purchase Agreement* with John J. Woell and Inez C. Woell regarding the Upper Swan Creek Channel Improvements Project and to authorize advertising the project for bids. Upon roll call vote, the motion carried unanimously.

Drains #15, #37 and #39 Channel Improvements

Mr. Opat reported design work and right of way acquisition is ongoing for Drains #15, #37 and #39 Channel Improvements. Pat Downs, Moore Engineering, Inc., is contacting property owners. It is hoped the project can begin this fall.

Lynchburg-Buffalo Project No. 2016-01

Mr. Opat reported State Water Commission cost-share was approved for Lynchburg-Buffalo Project No. 2016-01. Work on design and right of way continues. Mr. Opat hopes to open bids this fall.

Mr. Opat was contacted by Kevin Vining, United States Geological Survey, about conducting a water quality study addressing impacts of tile drainage versus surface drain runoff. The Board requested more information before moving forward with the study.

2016 Swan-Buffalo Detention Dam Repairs - No. 5 (Garsteig), No. 8 (Embden) and No. 12 (Absaraka)

Mr. Opat reported H & S Contracting, Inc. has been working on the 2016 Swan-Buffalo Detention Dam Repairs Project. The contractor has been having trouble keeping water out at Embden Dam. The completion date is tomorrow. Work is almost complete at Absaraka Dam and Garsteig Dam. The gates may not be available until September, due to a delay from the gate manufacturer. Mr. Opat relayed that H & S Contracting, Inc. requested a time extension due to weather delays and the manufacturer delay on the gates.

Mr. Opat informed the Board there is a need to install an erosion control blanket for back slope erosion control, which was not included in the contract. The contractor quoted a price of \$2 per square yard to install the erosion control blanket. It was moved by Manager Suhr and seconded by Manager Melvin to approve Change Order No. 1 for H & S Contracting, Inc. to extend the contract for the 2016 Swan-Buffalo Detention Dam Repairs Project to September 15, 2016, and to increase the total contract price in the amount of \$20,000 for the installation of an erosion control blanket. Upon roll call vote, the motion carried unanimously.

Lake Bertha Flood Control Project No. 75 - update

The Project Hearing for Lake Bertha Flood Control Project No. 75 has been scheduled at 9:00 a.m. on August 30, 2016, at the Embden Senior Center. Ballots will be sent out to property owners today.

Upper Maple River Dam

Mr. Opat submitted and reviewed an *Engineer's Final Statement of Cost* for the Upper Maple River Dam.

An Emergency Action Plan is being developed. The Maple-Steele Joint Water Resource District will meet to act on it. Annual meetings will be held to address any matters relating to the project.

Mr. Fredricks brought up signage at the dam. It was moved by Manager Suhr and seconded by Manager Melvin to proceed with the necessary signage at the Upper Maple River Dam site. Upon roll call vote, the motion carried unanimously.

Maintenance was discussed. Manager Suhr said mowing would be sufficient for weed control at this time. It was moved by Manager Suhr and seconded by Manager Melvin to approve the *Independent Contractor Agreement* with Jarrett Christoferson for mowing and maintenance of grass, weeds and other vegetation on and adjacent to the Upper Maple River Dam. Upon roll call vote, the motion carried unanimously.

Complaint for Water-Related Issues against Melvin Family Real Estate, LLLP regarding drain tile in Section 11 of Tower Township

The Board next discussed the *Complaint for Water-Related Issues* filed by David Percel against Melvin Family Real Estate, LLLP. In the complaint, Mr. Percel alleges Melvin Family Real Estate, LLLP, installed tile in Section 11 of Tower Township without a permit. Melvin Family Real Estate, LLLP, owns a half interest in all of Section 11 of Tower Township. Manager Melvin and his wife are the managing partners of Melvin Family Real Estate, LLLP. Randal and Kristi Melvin own the other half interest in all of Section 11; Randal Melvin is Manager Melvin's son. With these issues in mind, Mr. Fredricks indicated the Board should conduct a conflict analysis to determine if North Dakota's conflict of interest statutes require Manager Melvin to refrain from participating in the decision-making regarding this complaint.

Mr. Fredricks explained the conflict analysis the Board should conduct regarding Manager Melvin's potential conflict. Section 44-04-22 of the North Dakota Century Code provides the relevant standard. That statute provides:

A person acting in a legislative or quasi-legislative or judicial or quasi-judicial capacity for a political subdivision of the state who has a direct and substantial personal or pecuniary interest in a matter before that board, council, commission, or other body, must disclose the fact to the body of which that person is a member, and may not participate in or vote on that particular matter without the consent of a majority of the rest of the body.

Mr. Fredricks indicated the North Dakota Supreme Court and the Attorney General's Office have taken a narrow view of situations where a public official can abstain from participating in a matter. A public official must have a direct and substantial personal or pecuniary interest in the matter. The mere appearance of a conflict is not enough to allow the public official to refrain from participating. The North Dakota Supreme Court adopted a rule of necessity that requires public officials to participate in matters before their respective boards. The public policy rationale is that public officials have a duty to vote on issues before them, and cannot avoid participation simply to avoid the appearance of impropriety.

The Section 44-04-22 test requires a multi-step analysis. First, a public official concerned about a conflict of interest should confer with the Board's attorney to determine if a direct and substantial personal or pecuniary interest conflict exists under Section 44-04-22. If the public officials review with the governing entity's attorney is not dispositive, the remainder of the governing entity's Board should vote to determine if a conflict exists by a majority vote. If the remaining members conclude a conflict does exist (or if the member and the Board's attorney concludes a conflict exists), the remainder of the Board should next vote on whether or not the public official should participate in or vote on that particular

matter In other words, even if a conflict does exist (even if the official does have a direct and substantial personal or pecuniary interest in the matter), if the governing entity concludes the public official should still participate despite the conflict, the official must participate.

With regard to this complaint, Mr. Fredricks indicated the situation clearly creates a legal conflict situation since the complaint is directly against a partnership in which Manager Melvin is a managing partner. Further, the complaint is with regard to Manager Melvin's tile project on property in which Melvin Family Real Estate, LLLP, has an ownership interest. Mr. Fredricks indicated Manager Melvin very clearly has a "direct and substantial personal or pecuniary interest" in the outcome of this complaint. In light of this finding, the Board need not vote to determine if a conflict exists. However, under North Dakota's conflict analysis, the remaining members of the Board had to vote to determine if Manager Melvin should "participate in or vote" regarding the complaint. Upon a roll call vote, Manager Olson and Manager Suhr unanimously voted to prohibit Manager Melvin from participating in any decision-making regarding the complaint. However, Chairman Olson and Manager Suhr agreed that, in light of Manager Melvin's familiarity with the tile project at issue, Manager Melvin should cooperate with the Board regarding the Board's investigation regarding the complaint.

The Board next discussed the validity of the Complaint. Mr. David Keagle, attorney for the complainant, David Percel, was present to discuss the Complaint. Before the Board discussed the substance of the Complaint, Mr. Fredricks noted the Complaint alleged installation of a drain tile system in Section 11 of Tower Township without a permit. Mr. Fredricks further noted the Maple River Water Resource District did previously issue a permit to Jon, Randal, and Gerald Melvin for a tile system in all of Section 11 and the NW 1/4 of Section 14 in Tower Township. He further noted the conditions were minimal and did not require any additional consents, easements, or other documents that would otherwise render the permit ineffective. In other words, the Melvin's previously secured a subsurface drain permit for their tile system in Section 11 and the Melvin's have not violated the terms of their permit. With that in mind, the Board lacks jurisdiction to order removal or closure of the Melvin's tile project, under N.D. Cent. Code §§ 61-32-03.1 and 61-32-07.

Mr. Keagle indicated he was not aware of the permit previously issued by the Maple River Water Resource District for this property, and indicated his client had conducted some type of search for permits back through 2014 only. The Melvin permit was issued in 2012, and Mr. Fredricks indicated Mr. Percel could have, and should have, found the permit to the extent he did conduct a permit search. More specifically, a search of the State Water Commission website reveals the existence of the permit, by date, as State Drain Id. # 4528; the State Water Commission website does not even allow searches through 2014 only. Chairman Olson indicated that, in his view, Mr. Keagle, as counsel for Mr. Percel, also should have conducted a due diligence search to determine if the Melvin's tile project was permitted. Mr. Keagle indicated that, in his view, there was no further discussion necessary since the project was, in fact, permitted.

Mr. Fredricks asked if the Percels would voluntarily agree to pay the Board's expenses for processing the Complaint, as opposed to levying the assessments against their property. Mr. Keagle indicated they would voluntarily pay those expenses and that the

Board should simply provide a bill to Mr. Keagle's office. At the conclusion of any appeal periods, and after the Board calculates its total costs regarding the Complaint, the Board will issue an Order regarding collection of its costs and will provide the Order to Mr. Keagle's office. If Mr. Percel fails to reimburse the Board for the Board's costs, the Board will levy assessments against Mr. Percel's property.

Manager Suhr moved to dismiss the Drainage Complaint filed by David Percel against Melvin Family Real Estate, LLLP, and to conclude the Complaint was "frivolous" under North Dakota law. Manager Olson seconded the motion. Upon roll call vote, the motion carried unanimously.

Drain #58 – request from Mark Belter to use spoil material

Mark Belter has requested to use the spoil material from Drain #58 to construct access to a new building site on his property in the SE 1/4 of Section 29 in Maple River Township. Mr. Fredricks will draw up an agreement to be reviewed by the Board at the meeting next month.

Utility Permit for CenturyLink to install fiber optic cable in multiple locations of the Maple River Water Resource District

It was moved by Manager Suhr and seconded by Manager Melvin to approve the *Utility Permit* for CenturyLink to install fiber optic cable under the following locations, subject to conditions provided by the Water Resource District Engineer:

- Buffalo Creek tributary - 30' south of the 42nd Street SE centerline in the NE 1/4 of Section 2 in Walburg Township
- Buffalo Creek tributary - 30' east of the 150th Avenue SE centerline in the NW 1/4 of Section 24 in Walburg Township
- Swan Creek – 58' east of the State Highway 18 centerline in the SW 1/4 of Section 35 in Casselton Township
- Wheatland Channel – 85' east of the State Highway 18 centerline in the SE 1/4 of Section 11 in Everest Township
- Durbin-Everest Channel – 90' east of State Highway 18 centerline in the SW 1/4 of Section 23 in Everest Township
- Buffalo Creek - 105' east of the State Highway 18 centerline in the SW 1/4 of Section 26 in Everest Township
- Buffalo Creek - 105' east of the State Highway 18 centerline in the NW 1/4 of Section 2 in Maple River Township
- Buffalo Creek – 31' north of the 42nd Street SE centerline in the SW 1/4 of Section 36 in Everest Township
- Maple River – 30' south of the 42nd Street SE centerline in the NE 1/4 of Section 5 in Addison Township
- Drain #37 – 30' from the 42nd Street SE centerline in the SE 1/4 of Section 33 in Durbin Township
- Buffalo Creek Tributary – 55' east of the Cass County Highway 5 centerline in the SW 1/4 of Section 2 in Walburg Township.

Upon roll call vote, the motion carried unanimously.

Correspondence from Cass County Planning

It was moved by Manager Suhr and seconded by Manager Melvin to authorize the Secretary-Treasurer to submit comment, with input from the Water Resource District Engineer, to the Cass County Planner regarding the applications for the following:

- Kindred I94 Exit Subdivision in the N 1/2 of Section 4 in Mapleton Township
- Corner Subdivision in the S 1/2 NW 1/4 and N 1/2 SW 1/4 of Section 8 in Normanna Township

Upon roll call vote, the motion carried unanimously.

Bills

It was moved by Manager Melvin and seconded by Manager Suhr to approve the payment of Checks #5563 through #5572, and the electronic funds transfer, as presented. Upon roll call vote, the following Managers voted in favor: Olson, Suhr and Melvin. The Chairman declared the motion passed.

Adjournment

There being no further business for the Board to consider, it was moved by Manager Melvin, seconded by Manager Suhr and unanimously carried to adjourn the meeting.

APPROVED:

Rodger Olson
Chairman

ATTEST:

Carol Harbeke Lewis
Secretary-Treasurer